

# NATIONAL REVIEW

## President Trump Must End Illegal Obamacare Payments to Congress and Insurers

They are indeed ‘BAILOUTS.’

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Over the weekend, President Trump fired a warning shot: “If a new HealthCare Bill is not approved quickly, BAILOUTS for Insurance Companies and BAILOUTS for Members of Congress will end very soon!” Within moments of the tweet, Obamacare supporters discovered a new clause of the Constitution with which to thwart the president’s agenda: Goodbye Foreign Emoluments Clause, hello Take Care Clause. Under our Constitution, the president has a duty to “take Care that the Laws be faithfully executed.”

Were Mr. Trump threatening to stop making payments that are required by Obamacare, I would hop on the bandwagon. The “BAILOUTS,” however, are not part of the law the president has a duty to enforce. To faithfully execute the law, in fact, President Trump *must* stop these payments.

First, the White House should put an end to Congress’s special treatment under the Affordable Care Act. In 2009, Senator Chuck Grassley (R., Iowa) suggested an amendment to the health-care bill that would have prevented members of Congress and their staffs from receiving the same insurance other federal employees were eligible for; instead, they would purchase coverage on the exchange. As drafted, the provision eliminated the generous subsidies — in the form of employer contributions — that members and their staff previously received. Under the law, workers on Capitol Hill would now be put in the same position as other Americans who had to pay the full cost of their insurance.

As you can imagine, this provision proved to be very unpopular, but to this day Congress has not changed the law. Yet where Congress would not act, President Obama did so unilaterally. The Office of Personnel Management (OPM) announced that if members of Congress and their staff purchased insurance on the District of Columbia’s small-business exchange, they would receive the same employer subsidies that had been available to them before the Affordable Care Act. Mr. Trump is exactly right that this is a “BAILOUT.” But more important, the payments are a blatantly illegal effort to bypass Grassley’s unpopular amendment.

In 2014, a federal judge concluded that with the so-called OPM fix, the “executive branch has rewritten a key provision of the ACA so as to render it essentially meaningless in order to save members of Congress and their staffs.” Allowing the administration to rewrite the law, he wrote, “would be a violation of Article I of the Constitution, which reposes the lawmaking power in the legislative branch.” However, because the plaintiffs in the lawsuit (Senator Ron Johnson and one of his staffers) were not personally injured by OPM’s policy — indeed they benefited — the case

was dismissed for lack of standing. While the Obama administration was content to make these illegal payments, the Trump administration should halt them.

Congress is not the only beneficiary of such illegal largess. The ACA employed two strategies to make health insurance more affordable. Section 1401 of the law provides for the payment of subsidies to consumers to reduce premiums. Section 1402 provides payments to insurers to offset certain “cost sharing” fees, such as deductibles and co-pays.

But while the ACA funds the subsidies under Section 1401 with a permanent appropriation, to date, Congress has not provided an annual appropriation for the cost-sharing subsidies under Section 1402. Once again, where Congress would not act, President Obama did so unilaterally. The executive branch pretended that the ACA had actually funded Section 1402 all along, and it paid billions of dollars to insurers. Once again, Mr. Trump is exactly right that this is a “BAILOUT.” And, once again, the payments are a violation of the separation of powers.

Last year, a federal court ruled that Congress did not “squeeze the elephant of Section 1402 reimbursements into the mousehole of Section 1401.” Mr. Obama’s policy “violates the Constitution,” the court concluded. “Congress is the only source for such an appropriation, and no public money can be spent without one.”

This case, brought by the House of Representatives, now hovers in a state of limbo. The Trump Justice Department has not yet signaled whether it would continue the appeal begun by its predecessor. If the government is serious about repudiating pen-and-phone governance, it should announce that the payments are illegal and drop the appeal. This decision will no doubt trigger litigation by ACA supporters, but the far more obvious choice rests with the elected branch.

If Congress wants the government to subsidize its own insurance, it should pass a bill. If Congress wants the government to subsidize unprofitable insurance, it should pass a bill. It cannot punt to the president’s pen and phone.

Over the past eight years, the executive branch has failed to faithfully execute all manner of federal law. President Obama’s deferred-action policies halted the enforcement of immigration law against millions of aliens. Likewise, his Justice Department declined to prosecute marijuana crimes across the United States. Slowly but surely, the Trump administration has begun to reverse these transgressions against the Constitution.

Halting the illegal payments to insurers and Congress would go a long way to repair these breaches in our separation of powers. But here’s another negotiation tactic: Don’t rescind the payments immediately. Announce they will be repealed on January 1, 2018. A deadline may provide the nudge needed for Congress to reach consensus on health-care reform and prove that our checks and balances still work.

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